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NO. 82 - 2058

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDGAR D. NELSON, trading and doing business as NELSON HOUSE,
Petitioner,

V.

TUSCARORA INTERMEDIATE UNIT NO. 11,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF OPPOSING PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Before the Court is an assumpsit action between Tuscarora Intermediate Unit No. 11 (hereinafter Tuscarora)[1] and Edgar D. Nelson, t/d/b/a Nelson House (hereinafter Nelson), seeking to recover a tuition reimbursement in the amount of $1,687.09.

In June, 1972, Nelson entered into a private contract with the parents of Lawrence Fran Terwilliger (hereinafter Larry) to provide residential support for Larry for a fee. Nelson operated a licensed institution in Spruce Creek, Pennsylvania, to provide residential care for mentally retarded children. Tuscarora

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[1] Tuscarora is an intermediate unit organized under the Pennsylvania Education Code. One purpose is to provide special education services at the request of individual school districts. Established by the Pennsylvania General Assembly, its directors are designated by the school districts which it serves.

was the intermediate unit providing special education services to the school district for Spruce Creek, and during the 1973 - 1974 academic year, Nelson enrolled Larry in Tuscarora for 114 days. Tuscarora sought its tuition charges from Nelson, computed at an average of approximately $14.79 per day.

At the time Nelson undertook to provide services, Larry's parents were residents of the State of New Jersey. Based on the record below, at no time did either of his parents ever enter the Commonwealth of Pennsylvania. Larry and his parents were not made parties to the instant action.

When Nelson enrolled Larry in Tuscarora, the Commonwealth of Pennsylvania, by statute, required a local school district to provide educational services to a nonresident child who was housed in an institution within the

district. 24 P.S. Section 13-1306. However, for a child from outside Pennsylvania, the institution which had accepted him would be responsible for his tuition. 24 P.S. Section 13-1308.

Petitioner claims that Pennsylvania's statutory schema violates Section 504 of the Rehabilitation Act of 1973, 29 USC Section 794, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Respondent contends that there is not a violation of either, that Petitioner has no standing to litigate these issues, and that this is not an appropriate case for the Court to exercise its jurisdiction.

SUMMARY OF ARGUMENT

Pennsylvania's allocation of financial responsibility for education

expenses upon institutions which have accepted non-state residents does not discriminate aginast handicapped individuals, nor does it violate their right to equal protection. Nelson does not have standing to litigate Larry's individual rights in this Assumpsit action. There is no question of law at issue that justifies the grant of a writ of certiorari here.

ARGUMENT
REHABILITATION ACT

There is no dispute that Larry is a trainable mentally retarded child suffering from limitations of immature behavior and lack of self control. His parents could not locate a suitable residential facility in the State of their residence and so arranged for him to be housed at Nelson. While there, he was educated at Tuscarora.

The Rehabilitation Act of 1973, 29 U.S.C. Section 701, et seq., prohibits discrimination against any handicapped person based on his handicap by any organization receiving Federal financial assistance. 29 U.S.C. Section 794. Concededly, since Larry's impairments limit his major life activities, 29 U.S.C. Section 706(6), Larry is entitled to the protection of the Act. Thus, Tuscorara cannot discriminate against Larry based on his handicap.

However, there was no showing of any such discrimination. To the contrary, Larry received an appropriate education. As Judge Terrizzi found,

> "...[I]t must be conceded that Larry was afforded an education of the same type and quality as he would have been afforded if he were a resident of Huntingdon County living with his parents or a resident in a residential treatment facility placed there by his parents who were residents of another County in Pennsylvania."
>
> Pet. for Writ at A-13

Thus, Larry obtained the benefits required by the Act.

Nelson appears to argue that it is improper to charge Nelson for Larry's tuition. However, regulations promulgated after this controversy arose make it clear that there is nothing in 29 U.S.C. Section 794 that relieves a third party such as Nelson from valid obligations to pay for services provided a handicapped child. 45 C.F.R. Section 84.33.

Finally, Tuscarora did not charge Nelson for Larry's tuition because Larry was handicapped. Tuition reimbursement was sought because he was a nonresident. Under Pennsylvania law, tution reimbursement may be sought from any institution which brings nonresidents into the Commonwealth--handicapped or not.

Clearly, Larry was not discriminated against based on his handicap.

EQUAL PROTECTION

Petitioner argues, without citation, that,

> "It is a violation of the Equal Protection Clause not to provide this child, required under the circumstances to reside in Pennsylvania, with a free public education."
>
> Pet. for Writ at 10.

This contention begs the question for several reasons.

In the first place Larry did receive a public education that was free to him. Under the Education Code as interpreted by the Attorney General and construed by the Pennsylvania Supreme Court in this case, it is the obligation of the Commonwealth to provide such an education to all children within the Commonwealth, whether or not they are state residents. Op. of Pa. Atty. General No. 69, Oct. 11, 1973, 3 Pa. Bull. No. 46, Oct. 27, 1973.

As Judge Terrizzi found, supra., Larry did receive such an education. Thus there has been no abridgement of Larry's education rights.

Moreover, requiring tuition payment from an institution which accepts out of state residents does not unconstitutionally discriminate either. Pennsylvania delivers its education services through the local school districts, and a school district may expect compensation for educating any student from outside its boundaries--if from another district within the State, then from that district, Ferndale Area School District v. Shawley, 1973, 11 Pa. Commonwelth Ct. 185, 313 F.2d 366; if from without the State, then from the institution which agreed to bring him into the State. 24 P.S. Section 13-1308. Thus the class of those for whom tuition is charged uniformly embraces all

who reside outside the district, so that residents of other states suffer no special advantage.

Lastly, if the spectre of being required to reimburse for tuition would somehow impede Larry's parents from obtaining an appropriate free education for him, there is a mechanism whereby funding can be obtained from the entity with the ultimate responsibility for Larry's education--the New Jersey department of education. If the Nelson program could legitimately be said to be the only appropriate program for Larry for educational reasons, then an order requiring New Jersey to pay Nelson could have been sought under the Education of Handicapped Act. 20 U.S.C. Section 1401 et seq. Thus, there exists a means for Larry's parents to compell New Jersey to pay for Larry's education.

STANDING

The instant suit is between Nelson and Tuscarora. Nelson never exercised its right under Pa.R.Civ.P. No. 2252 to bring in Larry's parents or the State of New Jersey as additional defendants. Thus, the litigation before this Court does no involve an intended beneficiary of the Rehabilitation Act, but rather the claim of a business which, for a fee, provides services to handicapped persons.

In a pursuasive decision, the Court of Appeals for the Second Circuit held that handicapped students and their parents had standing to bring suit under the Rehabilitation Act of 1973, "because they were the people in the best position to enforce Section 504, which is designed specifically for their protection." Kampmeier v. Nyquist, 1977, 553 F.2d 296, 299.

This Court has recognized that a person may sue to enforce the rights of others under circumstances in which "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Barrows v. Jackson, 1953, 346 U.S. 249, 257, 73 S.Ct. 1031, 1035, 97 L.Ed. 1586.

In this case however, there is nothing in the record that Larry's parents--who have the strongest interest in assuring that Larry receive an appropriate education--suffer from any impediment which would interfere with their access to the courts. Indeed, their initiative in seeking out and employing Nelson to provide services to their son indicates their interest. If anyone should be litigating Larry's rights, it should be his parents and not Nelson.

Clearly, Nelson has no standing to raise Larry's rights in defense of this assumpsit claim.

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

The decision by the Pennsylvania Supreme Court that enforcement of Tuscarora'a right under Pennsylvania law to tuition reimbursement from Nelson does not infringe Larry's rights under the Rehabilitation Act of 1973 and under the Equal Protection Clause does not conflict with any reported decision from any other State Court of last resort, Federal Court of Appeals or this Court. Indeed, its decision is consistent with the law as interpreted by this Court in San Antonio Independent School District v. Rodriguez, 1973, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed2d 16 and Vlandis v. Kline, 1973, 412 U.S. 441, 93 S.Ct. 2230, 27 L.Ed.2d 63.

In Rodriguez, appellants challenged the Texas educational system on the basis that students in different school

districts received educations based on the different property tax bases in the districts. This Court found that it should not interfere with the method of allocating educational resources adopted by the Texas legislative.

> This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Taxas has chosen to raise and disburse State and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In doing, appellees would have the court intrude in an area in which it has traditionally deferred to State legislatures.
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> 411 U.S. 1, 40 (footnote omitted).

In Vlandis, the Court recognized that states would be permitted to give preferential treatment to state residents in setting tuition charges.

> We fully recognize that a state has a legitimate interest in protecting and preserving the quality of its colleges and universities and the

right of its own bona fide residents to attend such institutions on a preferential tuition basis.

412 U.S. 441, 452 - 453.

Indeed, in the context of higher education, the Court has upheld durational residence requirements. Memorial Hospital v. Maricopa County, 1974, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306.

More recent decisions do not detract from this earlier logic. In Plyler v. Doe, 1982, U.S. , 102 S.Ct. 2382, L.Ed.2d , the Court struck down a provision authorizing school districts to refuse to enroll the children of illegal aliens who were physically present in Texas. As Mr. Justice Blakmun noted in his concurring opinion, this result was not inconsistent with Rodriquez, because "the Court there reserved judgment on the constitutionality of a state system that 'occasioned an absolute denial of

educational opportunities to any of its children'..." ____ U.S. at ____, 102 S.Ct. at 2404. In Martinez v. Bynum, 1983, ____ U.S. ____, 103 S.Ct. 1838, 75 L.Ed.2d 879, the Court upheld a residence requirement for tuition-free education.

> A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment. It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents.
>
> Id., 103 S.Ct. 1842 - 43.

Pennsylvania does not deny educational opportunities to any group of children within its boundaries. What it does do is require that any institution bringing in non-residents reimburse the

school district for services provided. This practice is in harmony with each of the foregoing decisions.

CONCLUSION

Every school-aged child within the Commonwealth of Pennsylvania is offered a free appropriate public education. If his parents or guardian reject that public education, it automatically follows that they must arrange for a private education for their child. Normally, this involves either a direct or indirect payment by the parents or guardian of the child. Even when the child is given a free appropriate public education through the school system, in reality that education is never free. In fact, education costs money and it is paid for by the taxpayers. It is only reasonable, equitable and lawful, therefore, for the taxpayers of a jurisdiction, through their local

educational agency, to assess a charge by way of tuition for a nonresident child who comes within their jurisdiction and benefits from the school system which they support with their taxes. Likewise, it is only reasonable, equitable and lawful that the institution which is responsible for accepting that nonresident school-aged child into the school district either make the appropriate arrangements for the payment of that tuition from responsible parents when accepting the child, or failing to do so, should be held responsible itself for failure to make such arrangements. Since Pennsylvania law applies this tuition requirement, at the discretion of the Board of Education, equally to Pennsylvania residents who want their children to attend school in another district than their residence, as well as to nonresidents of Pennsylvania, the

Pennsylvania statutory scheme is not violative of Rehabilitation Act of 1973 or the Equal Protection Clause of the Fourteenth Amendment.

Therefore, the Court should decline to issue certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

MILLER, KISTLER & CAMPBELL, INC.

By: _____
H. Amos Goodall, Jr., Esq.

Dated: